CASE NO. ~~87-2035~~

in the

Supreme Court

of the

United States

OCTOBER TERM 1987

NATHAN GORDON AND LILLIAN GORDON, His Wife

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

5TH CIRCUIT C.A. NO 87-3015
DISTRICT COURT (E.D. La.) No. 86-1306

On Writ of Certiorari To
The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SCOTT R. BICKFORD, ESQ.
JOHN R. MARTZELL, ESQ.
Counsel of Record for Petitioner
MARTZELL, THOMAS & BICKFORD
338 Lafayette Street
New Orleans, LA 70130
(504) 581-9065

ALLEN D. FULLER
Counsel of Record for Petitioner
FULLER, FEINGOLD & MALLAH, P.A.
1111 Lincoln Rd., Suite 802
Miami Beach, FL 33193
(305) 538-6483

QUESTIONS FOR REVIEW

I.

WHETHER THE DECISION OF THE COURT OF APPEALS OF THE FIFTH CIRCUIT DENYING A CAUSE OF ACTION FOR NEGLIGENCE, UNSEAWORTHINESS, AND MAINTENANCE AND CURE TO A MERCHANT SEAMAN EMPLOYED BY THE UNITED STATES FOR INJURIES WHICH HE SUSTAINED ABOARD SHIP IMPROPERLY DESTROYS A REMEDY PROVIDED BY CONGRESS FOR A PARTICULAR CLASS OF SEAMEN?

II.

DID CONGRESS, BY ENACTING THE *CLARIFICATION ACT*, 50 U.S.C. Appendix § 1291 (1982), INTEND TO LEAVE A CLASS OF MERCHANT SEAMEN WITHOUT ANY REMEDY FOR INJURY OR DEATH SUSTAINED IN THE COURSE OF SERVICE ABOARD UNITED STATES GOVERNMENT VESSELS?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Lillian Gordon, on her behalf and as personal representative of the estate of her deceased husband, Nathan Gordon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding February 24, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 835 F.2d 96 (5th Cir. 1988) and is reprinted in the appendix, p. App. 1-12, *infra*.

The opinion of the United States District Court for the Eastern District of Louisiana (Livaudais, D.J.) has not been reported. It is reprinted in the appendix, p. App. 20-24, *infra*.

JURISDICTION

Invoking federal question jurisdiction, Petitioner brought this *Clarification Act* suit through the *Suits in Admiralty Act* against the United States and other parties in the Eastern District of Louisiana. The Government filed a Motion to Dismiss or in the Alternative for Summary Judgment, asserting that the *Clarification Act* was subject to the defense of discretionary function as set forth in 28 U.S.C. § 2680(a) of the *Federal Torts Claims Act (FTCA)* 28 U.S.C. 2674 *et seq.* (1982), and that the

challenged conduct was discretionary pursuant to the terms of that same statute. The United States claimed that the Court did not have subject matter jurisdiction. The Motion was granted, and the District Court entered final judgment on December 30, 1986. On January 7, 1987, petitioner filed an appeal. The Fifth Circuit affirmed the District Court's decision on January 5, 1988. Due to the large number of past and present seamen who are affected by the Fifth Circuit's decision, petitioner requested a rehearing *en banc*, which was denied on February 24, 1988. This petition was filed within ninety (90) days thereafter.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The *Clarification Act*, 50 U.S.C. app. § 1291 (1982) is reprinted in the Appendix, p. App. 15-19, *infra*.

STATEMENT OF THE FACTS

Nathan Gordon was a United States merchant seaman from 1941 until 1946. During that period, as a private individual, he came to be employed, from time to time, aboard vessels owned or bareboat chartered by the United States. The United States, then, as it does today, entered into charters known as "General Agency Agreements," (GAA) which provide that private shipping concerns

operate vessels on behalf of the United States. The merchant seamen, such as the petitioner, are hired by the private shipping concern, but, pursuant to this Court's decision in *Cosmopolitan Shipping Co., Inc. v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317 (1949), are considered employees of the United States.

While employed on GAA vessels, petitioner was exposed to asbestos which was a fixture and/or appurtenance of these vessels. Exposure to this toxic substance typically produces injuries which do not manifest for decades. In 1985, Petitioner was diagnosed as having mesothelioma, an incurable form of cancer. The primary known cause of mesothelioma is inhalation of asbestos fibers.

Lillian and Nathan Gordon brought suit against the United States, as prescribed by the procedures set forth in the *Clarification Act*, 50 U.S.C. Appendix § 1291 (1982) and the *Suits in Admiralty Act*, 46 U.S.C. § 741 *et seq*. They alleged a cause of action pursuant to the *Jones Act*, the general maritime warranty of seaworthiness and for maintenance and cure.

STATEMENT OF THE CASE

The primary question addressed to this Court is whether Congress intended to grant the United States a defense of discretionary function to suits brought by federally employed seamen.[1] In 1943, Congress recognized a need to provide merchant seamen in the employ of the United States remedial legislation which would serve to redress injuries which they suffered in the course and scope of their employment. Congress, therefore, directed that merchant seamen would be able to bring suit against the United States in its capacity as an employer and a shipowner pursuant to the terms of the *Jones Act*, the general maritime warranty of seaworthiness and the ancient doctrine of maintenance and cure. *Clarification Act*. At the same time, the Act denied to all merchant seamen from 1942 until the present all compensation remedies available to other government employees. The remedies which Congress granted this finite class of seamen were the same remedies available to seamen

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[1] The doctrine of discretionary function finds its legislative origins in the *Federal Torts Claims Act* which is a statute not at issue in this instant matter. 28 U.S.C. § 2680(a) provides that third-parties injured by the government may not hold the Government liable under *FTCA* for:

> "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

employed in the private sector.[2] These remedies, *to this day*, remain the sole remedies available to private merchant seamen in government employ. *Clarification Act; Cosmopolitan Shipping, supra.* The government now claims that the Courts should read into the *Clarification Act* and its operative statutes a defense of discretionary function.

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[2] Pursuant to the *Jones Act, supra*, merchant seamen are entitled to recover from their employer for work-related injuries by the finding of the slightest negligence. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1985).

Unseaworthiness is a doctrine which, by shifting risk to shipowner, provides protection for seamen from dangerous conditions beyond his control. *Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 87 S.Ct. 1410 (1967). The obligation of seaworthiness is peculiarly and exclusively the obligation of a shipowner and is one he cannot delegate or contract away. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, *rehearing denied* 328 U.S. 878, 66 S.Ct. 1116 (1946).

ARGUMENT

THE DECISION OF THE COURT OF APPEALS OF THE FIFTH CIRCUIT DENYING A CAUSE OF ACTION FOR NEGLIGENCE, UNSEAWORTHINESS, AND MAINTENANCE AND CURE TO A MERCHANT SEAMAN EMPLOYED BY THE UNITED STATES FOR INJURIES WHICH HE SUSTAINED ABOARD SHIP IMPROPERLY DESTROYS A REMEDY PROVIDED BY CONGRESS FOR A PARTICULAR CLASS OF SEAMEN.

CONGRESS, IN ENACTING THE *CLARIFICATION ACT*, 50 U.S.C. Appendix § 1291 (1982), DID NOT INTEND TO LEAVE A CLASS OF MERCHANT SEAMEN WITHOUT ANY REMEDY FOR INJURY OR DEATH SUSTAINED IN THE COURSE OF SERVICE ABOARD UNITED STATES GOVERNMENT VESSELS.

This action presents the precise situation for review by writ of certiorari contemplated by U.S. Supreme Ct. Rule 17C.

The instant case is not simply a matter which is solely of interest to the parties in this case, but constitutes a significant change in the substantive rights available to thousands of merchant seamen past, presently, and prospectively employed by the United States. Indeed, several cases are currently pending in at least two circuits

where the instant decision may be dispositive. See, *e.g.*, *Anna E. Brandenburg v. United States Lines, Inc., et al,* CA-83-5602 (E. La.), *Tommie Howard v. Lykes Brothers Steamship Co., Inc., et al,* CA 84-4047 (E. La.), *appeals docketed,* No. 87-3825, (5th Cir. Nov. 17, 1988); *Dorothy Smith v. United States*, C-86-5626 (D. CAL), *appeal docketed,* No. 88-1865, (9th Cir., Feb. 26, 1988). It also constitutes a real and embarrassing conflict with the scope and breadth of forty years of jurisprudence including decisions of this Court.

At issue is the power of the judiciary to legislate a defense of discretionary function as set forth in *FTCA* 28 U.S.C. § 2680(a) into the *Clarification Act.* By its decision, the Fifth Circuit nullified a carefully structured compensation scheme worked out among Congress, the War Shipping Administration (WSA), the Department of Justice, the Treasury Department, the War Department, the Federal Security Agency, the United States Employees' Compensation Commission, and the Civil Service Commission. *S.Rep. No. 1813*, 77th Cong., 2nd Sess., 5 (1942). The decision ignored reams of legislative history manifesting Congress' clear intent to protect merchant seamen so situated.

The Government, in creating the *Federal Employees' Compensation Act,* 5 U.S.C. § 751 *et seq.* 5 U.S.C.A. § 751, *et seq.* (Supp. III 1916) *(FECA)*, created a compensation system to award payment for injury. A similar

system was established by the *Clarification Act*. In *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849 (1952), this Court refused to allow judicially legislated exceptions to the *FECA*.

> As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

343 U.S. at 441, 72 S.Ct. at 857. Certiorari is sought in this matter to prevent judicial exceptions to the scope of the *Clarification Act*.

The relevant inquiry which the Fifth Circuit failed to make concerns Congress' perception of the then state of the law. *Brown v. General Services Administration*, 425 U.S. 820, 828, 96 S.Ct. 1961, 1966 (1976). As is set forth below, the unambiguous congressional perception, which precludes the imposition of a discretionary exemption, is strongly supported by the congressional record, the exclusivity of the seamen's remedy, congressional authorization of private insurance to mitigate the liability exposure of the United States, and forty-five years of case law approving judgments in suits alleging negligence for discretionary acts.

a. The legislative history attendant to the Act clearly manifests Congress' intent to provide unfettered remedies for merchant seamen.

The *Clarification Act* was enacted by Congress to extend substantive protections to private merchant seamen employed by the United States. The Act, at the same time, precludes recovery under the *FECA*. Concurrent legislation authorized the appropriate federal agencies to procure private insurance to underwrite the obligations undertaken. 50 U.S.C.A. App. § 1292 (West Supp. 1987).

The intended benefits provided seamen under the Act are expressly described in the *Clarification Act*. App. p. 15-19. The legislative purpose for extending such rights to merchant seamen is expressly described in *House Report No. 2572:*

> Your committee believes that there should be no delay in taking legislative steps needed for the protection of the merchant seamen. These men have faced hardships, capture, injury, and death in the forefront of the battle with the enemy. Their courage has been high and their spirits unflagging. Many of these men who have had their vessels torpedoed from under them have reached shore only to return to the conflict again. At sea they must constantly be on the alert and face danger and even death every hour of the day and night. No words

can be too strong to express the value of their services to the Nation in this war.

S. Rep. No. 1813, 77th Cong., 2nd Sess. 25 (1942), quoting *H. R. Rep. No. 2572*, 77th Cong., 2nd Sess. (1942).

The director of the WSA, the agency requesting the legislation at issue, stated:

> ...that seamen employed by or on behalf of the War Shipping Administration shall have the rights, benefits, and immunities to which they would be entitled if employed on privately owned and operated vessels with respect to death and injury claims, social-security benefits, allotments, and other matters covered by this section....
>
> *It is our feeling that Congress intended that seamen should receive the same benefit for death or injury from a collision in convoy or a stranding resulting from operation without lights or similar causes regardless of whether they are technically designated as marine risks or war risks.*

Merchant Marine Omnibus Bill: Hearings on H.R. 7424 before the Committee on the Merchant Marine and Fisheries House of Representatives, 77th Cong., 2nd Sess. 14-15 (1942) (statement of Admiral Land read by

Mr. Radner) [hereinafter cited as *Hearings on 7424*] (emphasis added).[3]

Clarifying the broad obligations which the United States assumed as it stepped into the shoes of a private shipowner, Francis Biddle, then Attorney General of the United States, testified that the bill would give seamen,

> all of the rights, benefits, and immunities that they would have if they were employed on privately owned vessels. It would also expressly provide that seamen shall not be entitled to any of the benefits or be subject to any of the changes provided for employees of the United States.

Hearings on 7424, supra, at 3 (testimony of Francis Biddle).

In a similar letter to the House Committee, Attorney General Biddle, while addressing the issue of seamen's jury right under the *Clarification Act*, stated:

> I dare say that there is no group to whom we as a Nation owe more in these first months of the war,

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[3] It should be noted that the compensable acts which Admiral Land cites would clearly be determined discretionary under this Court's decision in *U.S. v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig)*, 467 U.S. 797, 104 S.Ct. 2755 (1984).

> no group that has borne a larger brunt of the actual conflict than our merchant seamen. Certainly the [legal] protection afforded them *should be greater*, not less, than that which they enjoy in times of peace.

Hearings on 7424, supra, at 33 (letter to House Committee from Francis Biddle) (Emphasis added).

Petitioner respectfully submits that the testimony set forth above is but a modicum of the expressed intent of Congress. Congress did not contemplate or intend a defense of discretionary function at the time of enactment.

b. The judiciary has uniformly and consistently fulfilled the Congressional intent to provide GAA seamen with the traditional maritime remedies against the United States.

This Court, and the several circuit courts, has on numerous occasions interpreted seamen's remedies under the *Clarification Act*. The courts have never interpreted the United States' acts, no matter how discretionary, in the operation of merchant vessels to preclude recovery by merchant seamen and, prior to this action, the Government had not requested such an interpretation. For the past forty-five years myriad cases involving defective designs, unsafe work places and unseaworthiness have been decided against the Government.

Suits against the general agent were sanctioned by the Supreme Court in *Hust v. Moore-McCormack Lines*, 328 U.S. 707, 66 S.Ct. 1218 (1946). *Cosmopolitan* reversed *Hust* and left merchant seamen employed on General Agency vessels with their sole remedy against the United States. Although *Cosmopolitan* overruled *Hust* on these narrow grounds, the *Hust* Court's analysis of the *Clarification Act* was not affected. As the *Hust* Court stated, "[t]he basic scope and philosophy of the measure [the *Clarification Act*] is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit." 328 U.S. at 725, 66 S.Ct. 1227 n.32. The Court continued, "[i]ndeed one primary occasion for enacting the *Clarification Act* was to save seaman's rights in these respects rather than to take them away." 328 U.S. at 725-726, 66 S.Ct. at 1227.

The Government defended numerous *Clarification Act* claims brought by seamen without ever suggesting that its operation of vessels under General Agency was immunized by discretionary function. Congress, similarly, remained silent. In *Robinson v. United States*, 76 F.Supp. 422 (S.D. Ala. 1948), *aff'd* 170 F.2d 578 (5th Cir. 1948), the plaintiff sued for injuries which resulted from a blow to his chest. The Fifth Circuit affirmed a lower court decision holding the Government liable to the seaman for maintenance and cure.

> In this case the government waived its immunity from suit and, by legislative act, assumed the status of an ordinary ship owner and operator. So it is bound in a suit against it to the same extent as an ordinary owner.

Robinson, 76 F.Supp. at 425. In *Jensen v. United States*, 184 F.2d 72 (3rd Cir. 1950), the court affirmed a judgment against the United States for damages and maintenance and cure resulting from injury to a seaman on a GAA vessel.

> [W]e entertain no doubt that the United States by Section 2 of the *Suits in Admiralty Act* consented to be sued and to pay damages on such a basis. Certainly a private shipowner would be liable on the ground stated and the United States has consented to be sued as if it were a private shipowner.

Jensen, 184 F.2d at 75.

Moreover, the jurisprudence is replete with decisions confirming that the United States has consented in the past to be sued. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6 (1954) (United States liable for failure to maintain safe work place); *McCoy v. United States*, 689 F.2d 1196 (4th Cir. 1982) (United States liable for unseaworthiness due to conditions created when oil and water spilled into a forced draft fan area); *United States v. Smith*, 220 F.2d 548 (5th Cir. 1955) (United States liable for negligently maintaining ingress and egress and for

unseaworthiness); *Koehler v. United States*, 200 F.2d 588 (7th Cir. 1953) (The United States liable for unseaworthiness due to a defectively designed boiler); *Thurston v. United States*, 179 F.2d 514 (9th Cir. 1950), (the United States sued for injuries received in a fall from a defectively designed stair); *Farrell v. United States*, 167 F.2d 781 (2nd Cir. 1948), *aff'd* 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949); *Brislin v. United States*, 165 F.2d 296 (4th Cir. 1947) (United States liable for negligence in failing to properly secure the face plate of a radio transmitter); *United States v. Lubinski*, 153 F.2d 1013 (9th Cir. 1946); *Logue v. United States*, 85 F.Supp. 805 (S.D.N.Y. 1949) (United States liable for failure to furnish a safe work place).

c. The Fifth Circuit's declaration that the *Clarification Act* is subject to governmental immunity for discretionary functions is in direct conflict with this Court's specific directives against usurpation of the legislative prerogative.

The Fifth Circuit's position in this matter is contrary to legislative and judicial precedent. This Court has

counseled on numerous occasions against engrafting exemptions onto an act beyond those provided by Congress:

> There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.

United States v. Muniz, 374 U.S. 150, 166, 83 S.Ct. 1850, 1859 (1963), citing *Rayonier, Inc. v. United States*, 352 U.S. 315, 320, 77 S.Ct. 374, 377 (1957). In *Muniz*, the United States sought to exclude claims of prisoners under the *FTCA*. The Court, as noted above, refused to legislate the exemption sought by the Government.

In *United States v. Gilman*, 347 U.S. 507, 511-512, 74 S.Ct. 695, 697-698 (1954), the Court denied the Government's suit for indemnity against a government employee who collided with a private individual's automobile. The Court refused to read into the *FTCA* an indemnification provision.

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised.

> That function is more appropriately for those who write the laws, rather than for those whose who interpret them.

347 U.S. 497, 511-512, 74 S.Ct. 693, 697-698 (1954).

Most recently in *United States v. Johnson*, _U.S._, 107 S.Ct. 2063, 2070 (1987), in the dissent by Justice Scalia, four of this Court's justices questioned the judicial prerogative taken in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950). A similar analysis applies to the case at bar. Like the *Feres* doctrine, discretionary immunity under the *Clarification Act* affects the substantive rights of a large but finite group of individuals. Like the *Feres* doctrine, the imposition of discretionary immunity will call into question countless interpretations of the nature of acts of government employees and design aspects of government equipment and activities. Moreover, like the *Feres* doctrine, discretionary immunity will deny injured seamen compensation rights on a jurisdictional basis.

Further, when Congress chose to give the right of suit under the *Jones Act* and the general maritime law (specifically the warranty of seaworthiness), it did so with the full knowledge of the obligations which it assumed. This Court directs in *Brown* that Congress' perception must be interpreted within the confines of the law as it then existed. 425 U.S. at 828, 96 S.Ct. at 1966. The Fifth Circuit, referring in this matter to those rights as "nomenclature", ignores Congress' obvious knowledge

of the rights it imparted to merchant seamen as well as Congress' waiver of sovereign immunity.

Finally, a distinction must be drawn between a statute intended to quell the rising tide of private bills filed with the Congress, the *FTCA*, see *Dalehite v. United States*, 346 U.S. 15, 25, 73 S.Ct. 956, 962 (1953), and a statute which was enacted in lieu of workmens' compensation, the *Clarification Act*. As is noted by the *Dalehite* Court, the *FTCA* was the product of nearly thirty years of congressional consideration and was intended to afford relief to all third parties injured by certain government activities. 346 U.S. at 25, 73 S.Ct. at 962. The discretionary function exemption was drafted into versions of the *FTCA* as early as 1942. 346 U.S. at 26, 73 S.Ct. at 963. Conversely, the *Clarification Act* was drafted to clarify the rights of a finite set of government employees and provide them with remedial legislation for injury and death.

The same administration which drafted and approved the exemption-free *Clarification Act*, expressly

requested that the same Congress include discretionary immunity in a 1942 version of *FTCA* to avoid,

> ...'any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity', merely because 'the same conduct by a private individual would be tortious.'

346 U.S. at 26, 73 S.Ct. at 963, quoting *Hearings before the House Committee on the Judiciary*, 77th Cong., 2nd Sess., on *H.R. 5373* and *H.R. 6463*, pp. 6, 25, 33. It must be assumed, pursuant to *Brown, supra*, that Congress, as well as the Administration, was aware of the exemption of discretionary function as it might be applied to the *Clarification Act*. Following the dictates of *Brown, supra*, the Government must be assumed to have recognized the scope and breadth of the substantive statutes to which it waived immunity.

Finally, this Court has accepted certiorari in *Berkovitz v. United States*, 822 F.2d 1322 (3rd Cir. 1987) *cert. granted*, 108 S.Ct. 692 (1988), a matter in which the petitioner has appealed the scope of the Government's discretionary immunity. Petitioner respectfully suggests the resolution of this instant matter may, in part, be influenced by the Court's decision in that matter. Petitioner would ask the Court's specific review of the exception as it applies to the Government's operation of merchant vessels.

Petitioner contends the furnishing of proper warnings and protective gear to merchant seamen is not a protection falling within the bounds of a discretionary decision by the United States. Here the discretion, if any, was deciding whether to operate merchant vessels by contract with private shipping concerns. The Government's discretion was exercised to assume ownership and/or operation of the Merchant Fleet. The discretion was to assume liability, through Service Agreements for vessels and the *Clarification Act*, for seamen's injuries. In summary, the Government elected to operate vessels as a private shipowner and is responsible to injured seamen to the same extent as private employers.

CONCLUSION

The Fifth Circuit's decision will cause great uncertainty regarding the substantive legal rights of government employed merchant seamen, and result in the *Clarification Act* clarifying nothing. Indeed, the Fifth Circuit's decision, if allowed to stand, will leave a class of merchant seamen without remedy for personal injury or death.

Petitioner respectfully requests that this Court grant certiorari on the issue of whether it is proper to impute a discretionary exemption into the *Clarification Act*, the *Jones Act*, the general maritime law, and the ancient doctrine of maintenance and cure, as those substantive laws apply to government employed merchant seamen.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of May, 1988 to : GREGORY C. SISK, U.S. Department of Justice, Civil Division, Appellate Staff, Room 3631, Washington, D.C. 20530 and SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

MARTZELL, THOMAS
& BICKFORD
Counsel of Record for Petitioner
338 Lafayette Street
New Orleans, LA 70130
(504) 581-9065

By: _____
SCOTT R. BICKFORD
JOHN R. MARTZELL

STATE OF LOUISIANA)
)SS
PARISH OF ORLEANS)

SWORN TO AND SUBSCRIBED before me the undersigned authority this 9th day of June, 1988.

_____
NOTARY PUBLIC
State of Louisiana

Appendix

App.

[FILED JAN. 5, 1988]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CA No. 87-3015
DC No. 86-1306

NATHAN GORDON AND LILLIAN GORDON, His Wife
Plaintiffs-Appellants,

-v.

LYKES BROTHERS STEAMSHIP CO.,
INC., et al,
Defendants,

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
Honorable Marcel Livaudais, Jr., District Judge, Presiding
Argued and Submitted November 3, 1987 - New Orleans

MEMORANDUM

Before: SNEED*, REAVLEY and JOHNSON
CIRCUIT JUDGES

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*Circuit Judge of the Ninth Circuit, sitting by designation.

SNEED, Circuit Judge:

Gordon, a former merchant seaman, and his wife brought suit in admiralty against the United States for injuries contracted from exposure to asbestos on government ships during World War II. The district court dismissed the claim on summary judgment. It held that the discretionary function exception to waivers of sovereign immunity applied to claims under the Suits in Admiralty Act and therefore held that it had no subject matter jurisdiction. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Plaintiff-appellant Gordon was a marine engineer during World War II. During that time he worked in the engine rooms of twelve different merchant cargo and Liberty ships. The engine rooms of such ships were heavily insulated with asbestos. One of Gordon's jobs was to repair and maintain asbestos-containing insulation. Gordon alleges that he contracted an asbestos-related disease as a result of working on these ships.

During World War II, a government agency, the War Shipping Administration (WSA), assumed control of almost all U.S. merchant marine vessels. The vessels continued to be operated by the original private owners pursuant to General Agency Agreements. Members of the merchant marine, who customarily sail first on one vessel and then on another, were put in an unusual legal position because of the new relationship between the

United States and the owners of the vessels. The rights of seamen, as private employees, included the right to sue their employer under the Jones Act for injury or death. United States government employees, however, were restricted to a particular and quite different compensation scheme for injuries. To deal with the problems caused by having separate compensation systems depending on the kind of ownership interest the United States might have in a vessel, Congress enacted the Clarification Act of 1943. The Clarification Act effectively broadened the Scope of the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 741-752 (1982), by permitting seamen on merchant vessels that were owned by the United States, or bareboats-chartered to the WSA, to sue the United States instead of the private company that owned the vessel.

Efficient ship construction and operation was a very high priority of the United States government during World War II. The government sought to standardize construction of merchant vessels. A consequence was that asbestos was used heavily in ship construction.

In 1985, Gordon and his wife filed a personal injury suit against several private shipowners in the Southern District of Florida alleging that Gordon had contracted an asbestos-related disease while working aboard various vessels. The action was transferred to the Eastern District of Louisiana where it was consolidated with a number of seamen's asbestos cases.

The Gordons also filed an administrative claim against the United States with the Maritime Commission pursuant to the SAA, which was denied on February 6, 1986. Thereafter, the Gordons filed an amended complaint in District Court naming the United States and various asbestos manufacturers as parties.

The United States filed a motion for summary judgment denying subject matter jurisdiction and arguing that the use of asbestos on vessels during World War II fell within the discretionary function exception to waivers of sovereign immunity. The district court granted the government's motion and dismissed for lack of subject matter jurisdiction. The district court then denied a motion reconsideration. The case against the defendant shipowners and asbestos manufacturers was settled soon after a jury was selected. The final judgment dismissing the United States was entered on December 31, 1986. Notice of this appeal was timely filed on January 17, 1987.

II.

JURISDICTION

The district court's jurisdiction rested on the SAA, 46 U.S.C. § 742 (1982), and 28 U.S.C. §1333(1) (1982) admiralty jurisdiction. Our jurisdiction is derived from 28 U.S.C. §1291 (1982).

III.

STANDARD OF REVIEW

This case was dismissed on summary judgment. We repeat the ritualistic sentences setting forth our standard of review. Summary judgment dismissal is reviewed *de novo*. *Brock v. Republic Airlines, Inc.*, 776 F.2d 523, 527 (5th Cir.1985); *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 714 (5th Cir.1985). Therefore, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

IV.

DISCUSSION

A. *The Suits in Admiralty Act, the Clarification Act, and Discretionary Function Exception*

Initially, we confront the question whether the discretionary function exception is applicable to the facts of this case. This issue, in our view, previously has been decided affirmatively by this court. *See Wiggins v. United States*, 799 F.2d 962, 966 (5th Cir.1986).

[1] Briefly we sketch the outline of the issue. Suits in admiralty may be brought against the United States under the SAA. This act waives the government's sovereign immunity.

> In cases where if [a U.S.] vessel were privately owned or operated, or if [U.S.] cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States....

Id. § 742.

In effect, the SAA is a jurisdictional statute providing for maintenance of admiralty suits against the United States which encompasses all maritime torts alleged against the United States. *See United States v. United Continental Tuna Corp.*, 425 U.S. 164, 176 N. 14, 96 S.Ct. 1319, 1326 n. 14, 47 L.Ed.2d 653 (1976).

[2] The Clarification Act, passed during World War II, also waived the government's sovereign immunity. It applied to maritime claims made by merchant seamen sailing on WSA-operated vessels. Under the Act seamen

> employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to ... death, injuries, illness, ... have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

50 U.S.C. app. §1291(a) (1982). At the same time the Act took away their right to sue private vessel owners and any rights to compensation under any U.S. employees' compensation scheme. The Act also states that any claim made for death, injury, and disease, after administrative denial, be "enforced pursuant to the provisions of the Suits in Admiralty Act." *Id.*

The precise scope of these waivers of sovereign immunity has been before the courts on several occasions. Unlike the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674 *et seq.* (1982), no discretionary function exception to these waivers was expressed. The discretionary function exception, at its root, stands for the proposition that "it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 979, 97 L.Ed. 1427 (Jackson, J., dissenting). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. Varig Airlines*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Notwithstanding the absence of express language, this court has agreed with other circuits that "a discretionary functions limitation is implicit in

private suits brought against the United States Government under the Suits in Admiralty Act." *Wiggins v. United States,* 799 F.2d at 966. *See Gemp v. United States*, 684 F.2d 404, 408 (6th Cir.1982); *Estate of Callas v. United States*, 682 F.2d 613, 619 (7th Cir.1982); *Bearce v. United States*, 614 F.2d 556, 559-60 (7th Cir.), *cert. denied*, 449 U.S. 887, 101 S.Ct. 112, 66 L.Ed.2d 44(1980); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1085-87 (D.C.Cir.1980); *Gercey v. United* States, 540 F.2d 536, 539 (1st Cir.1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977). This court in *Wiggins* read the discretionary function exception into the SAA based on a review of the Supreme Court's decision in *United States v. Varig Airlines*, 467 U.S. 797, 104 S.Ct 2755, 81 L.Ed.2d 660 (1984), and its conclusion that the discretionary function exception is based on a "combination of the doctrines of sovereign immunity and separation of powers." *Wiggins*, 799 F.2d at 965.

[3] Plaintiffs argue, however, that their rights stem from the Clarification Act, not the SAA. The former, they insist, should be read literally, thereby excluding a discretionary function exception. They fail to mention, however, that the language in the Clarification Act utilizes the SAA to make its authorized claims enforceable. This justifies our drawing upon the deep sources that nourished *Wiggins*. Having done so, we hold that the Clarification Act is limited by the discretionary function.

B. *The Reach of the Discretionary Function Exception*

[4] The Gordons understandably argue that the construction of ships using asbestos insulation, the operation of ships already built with asbestos insulation, and the failure to maintain safe working conditions in an asbestos-surrounded environment were negligent actions not protected by the discretionary function exception. They support their position by arguing that the exception does not trump the duty to provide a seaworthy vessel, a duty they insist the United States did not perform.

While all acknowledge that the important acts of high officials and the routine acts of their low-level agents constitute the extremes of the discretionary-nondiscretionary function spectrum, all also recognize that there is no wholly satisfactory classification of those acts that fall near the mid-point of this spectrum. In examining the scope of the exception to the FTCA, the Supreme Court said it is impossible "to define with precision every contour of the discretionary function exception." *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. Nonetheless, the Court said it is possible

> to isolate several factors useful in determining when the acts of a Government employee are protected from liability.... First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.... Thus, the basic inquiry ... is whether the challenged acts of a Government employee - whatever his or her

> rank-are of the nature and quality that Congress intended to shield from tort liability. Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.... This [congressional] emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second- guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
>
> *Id.* at 813-14, 104 S.Ct. at 2764-65.

In *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956, 967-68, 97 L.Ed. 1427 (1953), the seminal case that *Varig* reaffirmed, the Supreme Court said that governmental discretion includes not only the initiation of programs and activities, but also "determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."

The facts in *Dalehite* support our holding. The Court immunized the decisions of government officials who decided to adopt certain production standards in the interest of quickly providing fertilizer to war-torn countries. The fertilizer was produced and distributed as

per the specifications, and under the control, of the United States. The chain of command and control of government officials over the operation was quite similar to the roles of the relevant government officials in the WSA. In *Dalehite*, "[t]he negligence charged was that the United States, without definitive investigation of [the chemical's] properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions." *Id.* at 23, 73 S.Ct. at 962. Nonetheless, the Court found that the government's action were immunized by the discretionary function exception.

In the case before us, the government has provided a substantial amount of historical evidence showing that the use of asbestos was consistent both with the policy of building the ships rapidly and the existing standard design. In both cases officials chose from among important alternative courses of action. The government's decision not to establish a safety program for seamen working with asbestos was a similar choice. The teaching of *Varig* and *Dalehite* has been recognized in cases similar to this one. For example, in *Shuman v. United States*, 765 F.2d 283 (1st Cir.1985), the court found the government immunized by the exercise of its discretion in not establishing a safety program. The plaintiff claimed damages under the FTCA for asbestos-related death stemming from the negligence of the United States in allowing certain working conditions at shipyards during the war. The *Shuman* court referred to *Dalehite* and *Varig*, and found that "[l]ack of due care in promul-

gating a policy, or in having no policy or program at all on an issue, however imprudent it might seem, is encompassed within the discretionary function exception." *Id.* at 290. Similarly, in *Ford v. American Motors Corp.*, 770 F.2d 465 (5th Cir.1985), this court addressed a claim that the Postal Service was negligent in selling jeeps at surplus without warning the buyers of the jeeps' propensity to overturn in certain situations. We found that "[t]he decision to sell, including time, place, method, manner, and procedure, was likewise a discretionary act. Whether considered as a commission or omission, the decision not to issue cautions or warnings about the increased rollover potential was also within the discretionary parameters of the Postal Service." *Id* at 467. And *Wiggins* itself followed the same line in holding that the decision of the Army Corps of Engineers not to remove pilings from a lake was "exempt from challenge exception of § 745 of the SAA." *Wiggins*, 799 F.2d at 967.

In all the above cases, the government created no danger to the plaintiff after the critical discretionary decision had been made. This essential fact cannot be overcome by clothing the discretionary act in the maritime uniform of a breach of a duty to provide a seaworthy vessel. Nomenclature, even when backed by the traditions of admiralty law, must yield to the force of those deep constitutional roots that impart strength to the discretionary function exception.

The decision of the district court is affirmed.

AFFIRMED.

[FILED FEB. 24, 1988]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CA No. 87-3015
DC No. 86-1306

NATHAN GORDON AND LILLIAN GORDON, His Wife
Plaintiffs-Appellants,

-v.

LYKES BROTHERS STEAMSHIP CO.,
INC., et al,
Defendants,

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: SNEED*, REAVLEY and JOHNSON
CIRCUIT JUDGES

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel

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* Circuit Judge of the Ninth Circuit, sitting by designation.

nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

CLARIFICATION ACT

The following is a verbatim transcription of the applicable statutory provisions involved in this case:

ACT MAR. 24, 1943, C. 26, 57 STAT. 45

§1291. RIGHTS OF AMERICAN SEAMEN ON PRIVATELY OWNED AND OPERATED AMERICAN VESSELS EXTENDED TO SEAMEN EMPLOYED THROUGH THE WAR SHIPPING ADMINISTRATION; EXCEPTIONS; DEFINITIONS

(a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act [42 U.S.C.A. § 301 et seq.], as amended by subsection (b)(2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime charac-

ter of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act as amended [5 U.S.C.A. § 8101 et seq.]; the Civil Service Retirement Act, as amended [5 U.S.C.A. § 8331 et seq.]; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursements therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress) [42 U.S.C.A. §1701 et seq.]. Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seamen were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act [46 U.S.C.A. § 741 et seq.], notwithstanding the vessel on which the seamen is employed is not a merchant vessel within the meaning of such Act [said sections]. Any claim, right, or cause of action of or in respect of any such seamen accruing on or after October 1, 1941, and prior to the date of enactment of this section [Mar.24,1943] may be enforced, and upon the election of the seamen or his surviving dependent or beneficiary, or his

legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seamen under the Social Security Act [42 U.S.C.A. § 301 et seq.], as amended by subsection (b)(2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

(b)(1) Omitted [Amendment of section 1426 of the Internal Revenue Code of 1939].

(2) Omitted [Amendment of section 209 of the Social Security Act, as amended (42 U.S.C.A. § 409)].

(3) Omitted [Amendment of section 907 of the Social Security Act Amendments of 1939 (53 Stat. 1402)].

(c) The War Shipping Administration and its agents or persons acting on its behalf or for its account may, for convenience of administration, with the approval of the Administrator, make payments of any taxes, fees, charges, or exactions to the United States or its agencies.

Termination of the War Shipping Administration. Section 202 of Act July 8, 1946, c. 543, Title II, 60 Stat. 501, terminated the War Shipping Administration as of Sept. 1, 1946, and transferred all functions, powers, duties, etc. to the United States Maritime Commission for the period from Sept. 1, 1946 to Dec. 31, 1946, for the purpose of liquidating the Administration.

Abolishment of Commissions and transfer of functions. The United States Maritime Commissions was abolished by 1950 Reorg. Plan No. 21, eff May 24, 1950, 15 F.R. 3178, 64 Stat. 1273, set out in note under section 1111 of Title 46, Shipping, which transferred part of its functions and part of the functions of its Chairman to the Federal Maritime Board and the Chairman thereof, such Board having been created by that Plan as an agency within the Department of Commerce with an independent status in some respects, and transferred the remainder of such Commissions's functions

and the functions of its Chairman to the Secretary of Commerce, with power vested in the Secretary to authorize their performance by the Maritime Administrator, the head of the Maritime Administration, which likewise was established by the Plan in the Department of Commerce with the provision that the chairman of said Federal Maritime Board should, ex officio, be such Administrator.

[FILED AUG. 28, 1986]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN T. HANNON, ET AL	CIVIL ACTION
VERSUS	NO. 80-1175 E (2)
WATERMAN STEAMSHIP CO., ET AL	CONSOLIDATED WITH NO. 86-1306 NATHAN GORDON, FL. 7

ORDER AND REASONS

Plaintiff, Nathan Gordon, initially filed suit in the Southern District of Florida on November 13, 1985, against one defendant, a steamship company. That suit was transferred to the Eastern District of Louisiana, and combined with the other seamen's asbestos cases pending in this district. On April 16, 1986, plaintiff filed a First Supplemental & Amended complaint, naming additional defendants, including the United States of America. Plaintiff has sued the United States of America pursuant to the Suits in Admirality Act, 46 U.S.C. §742 (SAA). Plaintiff claims that while he served aboard vessels in World War II as a merchant marine engineer from 1942 to 1946 he was caused to come into contact with asbestos and that such contact has resulted in a disease diagnosed as mesothelioma.

The plaintiff's claim is based upon the fact that many of the ships he served on were constructed by the United

States for use in World War II and contained asbestos and further that the United States allegedly did nothing to render such conditions safe. The plaintiff claims that the United States is liable for the failure to provide a safe place to work, failure to warn, failure to furnish proper equipment and failure to insure the proper operation of the vessels' men and machinery.

The United States has moved for summary judgment on the basis that plaintiff's claims are based upon the exercise of discretion by the Executive Branch of government and that the United States has not waived sovereign immunity for such claims. Accordingly, the court is without jurisdiction.

For the following reasons, I find that the "discretionary function" exclusion found in the Federal Torts Claims Act (FTCA), 28 U.S.C. §2680 (a) is applicable to a claim under the SAA and further, since the conduct of the United States in the case at hand falls under the "discretionary function" exclusion, the motion of the United States for summary judgment is GRANTED.

It appears to be established that the discretionary function exclusion found in the FTCA is implicit in the SAA. See *Gemp v. United States*, 684 F.2d 404 (6th Cir. 1982); *Estate of Callas v. United States*, 682 F.2d 613 (7th Cir. 1982); *Canadian Transport Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980); *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980), *cert. denied*, 449 U.S. 837 (1980); *Gearcy v. United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

At one time, the Fifth Circuit Court of Appeals suggested that the discretionary function exclusion in the FTCA should not be applied to a SAA claim. *DeBardeleben Marine Corps v. United States*, 451 F.2d 140, 145-46 (5th Cir. 1971). However, the Fifth Circuit appears to have retreated from this position. See *McCormick v. United States*, 645 F.2d 299, 309 FN 18 noting FN 12 at 306.

Courts in this district have also noticed the Fifth Circuit's apparent retreat from *DeBardeleben* and have held that the discretion function exception to the FTCA is implicit in the SAA. See *In re: Ocean Ranger Sinking off Newfoundland on February 15, 1985*, MDL Docket no. 508, Section "C", May 10, 1985 (unreported decision attached to the government's motion as Exhibit G), *Wiggins v. United States*, (E.D. La., No. 85-1235, Section "F", October 22, 1985) (unreported decision attached to the government's motion as Exhibit H).

For these reasons I find the discretionary function exception to be applicable to the plaintiff's claim under the SAA.

In *United States v. S.A. Emprese DeViaco Aerea Rio Grandese (Varig)*, 467 U.S. 797 (1984), the Supreme Court reasoned that Congress' underlying consideration for including the discretionary function exception the FAA to be that:

> Congress wished to prevent judicial 'second guessing' of legislative and administrative

> decisions grounded in social, economic, political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took 'steps to protect the Government from liability that would seriously handicap efficient government operation.'

Id. at 814. (citation omitted)

The above quoted language appears to find its root in the separation of powers doctrine.

The *Varig* court reasoned that in determining whether the discretionary function exception is applicable, the courts are to look to the nature of the challenged conduct of Governmental employees to discern if such acts were intended by Congress to be shielded from tort liability. I find that the challenged governmental conduct, whether it be in ship construction or in ship operations during the time of World War II, was intended by Congress to be shielded from tort liability.

Although the results seems harsh, I find that as a result of the age old doctrine of Sovereign Immunity, this court lacks subject matter jurisdiction over the claims of the plaintiff asserted against the United States.

Accordingly,

IT IS ORDERED that the suit of Nathan and Lillian

Gordon against the United States is hereby DISMISSED at plaintiff's costs.

New Orleans, Louisiana, August 28, 1986.